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No. 90-1021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PETER SUGAR, DAVID D. WARNER, and JAFFE, SNIDER, RAITT & HEUER, Professional Corporation,

Petitioners,

v.

DIAMOND MORTGAGE CORPORATION OF ILLINOIS and A.J. OBIE & ASSOCIATES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

RONALD R. PETERSON
RUSS M. STROBEL
Counsel of Record
C. STEVEN TOMASHEFSKY
DANIEL S. GOLDMAN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Counsel for Respondents

Photex — 444 North Wabash Avenue — Chicago 60611 — 321-0223

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No. 90-1021

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

PETER SUGAR, DAVID D. WARNER, and JAFFE, SNIDER, RAITT & HEUER, Professional Corporation,

Petitioners,

v.

DIAMOND MORTGAGE CORPORATION OF ILLINOIS and A.J. OBIE & ASSOCIATES, INC., Debtors-in-Possession,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Diamond Mortgage Corporation of Illinois ("Diamond") and A.J. Obie & Associates, Inc. ("Obie"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision below. The

opinion of the United States Court of Appeals for the Seventh Circuit is reported at 913 F.2d 1233 (1990).

SUMMARY OF ARGUMENT

1. The judgment below rests on alternative grounds, one of which is solely a matter of Illinois law. Thus, even if this Court were inclined to review the federal-law issue in this case, it could not change the outcome unless the Court also reviewed and reversed the Court of Appeals' state-law holding. This Court should not expend its limited resources in reviewing appellate determinations of state law or in issuing advisory opinions that cannot change the judgment below.

2. Moreover, Petitioners' argument for review of the federal-law issue demonstrates no conflict with any opinion of this Court, no conflict among the circuits, and no dissenting opinions or en

banc consideration of the issue in the Court of Appeals. Indeed, Petitioners themselves demonstrate a unanimity of judicial and academic support for the Court of Appeals' holding and merely argue that all these courts and commentators are "confused." Only Petitioners are confused. The petition presents no federal issue needing clarification and should be denied.

STATEMENT OF THE CASE

Diamond was a mortgage lender that made loans on real estate located in Illinois. It is an Illinois corporation, and, at all times, its only offices have been in Illinois. Obie was an affiliated Illinois corporation that offered for sale, solely to Illinois investors, mortgage notes originated by Diamond and secured by Illinois real estate.

On August 25, 1986, Diamond and Obie filed petitions for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Illinois. Some investors had received a properly recorded assignment of a mortgage and were treated as secured creditors. Many other investors, however, never were assigned a mortgage and became unsecured creditors of the bankruptcy estates. The corporations' combined insolvency exceeded $10 million.

Petitioners are Detroit-based attorneys who represented Diamond and Obie as securities counsel from 1981 until shortly before the bankruptcies.[1/]

1/ Diamond also sued Michigan attorney Ronald M. Barron (and several law firms of which he was senior partner). The Barron defendants acted as Diamond's and Obie's general counsel during the 1981-86 period. Although the Court of Appeals' ruling applies to the Barron defendants, they have not joined in Petitioners' petition or filed one of their own.

Petitioners prepared the offering circulars distributed by Obie to Illinois investors. They also reviewed and revised advertising materials used by Obie to solicit Illinois purchasers for the Diamond mortgage notes. Finally, they corresponded with Illinois regulatory agencies on Diamond's and Obie's behalf.

At the same time they represented Diamond and Obie, Petitioners also represented several Michigan-based corporations affiliated with Diamond and Obie. The Complaint alleges that Petitioners committed legal malpractice and breached their fiduciary duties to Diamond and Obie in four ways. First, they simultaneously represented the Michigan corporations that were transacting business with Diamond and Obie and which looted Diamond and Obie in those transactions. Second, they failed to advise Diamond and Obie properly as to the

conflict of interest posed by that simultaneous representation. Third, they failed to withdraw from the conflicting representation when they should have done so. Fourth, they failed properly to advise Diamond and Obie regarding the corporations' own unsafe and unsound business practices. These breaches prolonged Diamond's and Obie's existence past the point of insolvency and deepened the insolvency.

In 1988, Diamond and Obie, as debtors-in-possession, filed the Complaint in the United States District Court for the Northern District of Illinois, the district in which the Chapter 11 cases were pending.[2/] The Complaint predicated

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[2/] Diamond and Obie filed the Complaint with the District Court clerk because they were entitled to a jury trial, and it was established in the Northern District of Illinois that Article I bankruptcy judges could not conduct jury trials. See, e.g., Reda, Inc. v. Harris Trust & Savings Bank

(continued...)

subject matter jurisdiction on both 28 U.S.C. §§ 1332(a)(1) (diversity of citizenship) and 1334(b) (bankruptcy). Petitioners do not contest the validity of either jurisdictional basis. Pet. at 2-3 and n. 3.

Petitioners moved to dismiss under Fed. R. Civ. P. 12(b)(2), alleging lack of personal jurisdiction.[3/] Diamond and

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[2/] (...continued)
(In re Reda, Inc.), 60 Bankr. 178, 182-83 (Bankr. N.D. Ill. 1986); cf. Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782, 2802 (1989) (leaving open question whether bankruptcy judges can conduct jury trials). This Court recently remanded on jurisdictional grounds a case in which certiorari had been granted to decide whether bankruptcy judges can constitutionally conduct some jury trials. Insurance Co. of the State of Pennsylvania v. Ben Cooper, Inc., 111 S. Ct. 425 (1990).

[3/] Petitioners also moved to dismiss under Fed. R. Civ. P. 12(b)(6), alleging failure to state a claim for which relief can be granted. The District Court did not reach this issue. Petitioners reasserted their 12(b)(6) motion in the Court of Appeals, which rejected Petitioners' claim. Petitioners' Appendix
(continued...)

Obie argued that jurisdiction was proper pursuant to nationwide service of process under Bankruptcy Rule 7004(d) and the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, ¶ 2-209.[4/] On Petitioners' motion, the District Court stayed all discovery, including discovery as to jurisdictional facts.[5/]

[3/] (...continued)
("APP.") 26a-27a. Petitioners do not seek review of that ruling here.

[4/] This statute was amended effective September 7, 1989 by Public Act 86-840. The current statute differs significantly from the statute in effect when the Complaint was filed. See Exhibit 1 hereto.

[5/] Petitioners assert that the factual record is "extensive" and includes all of their files. Pet at 4. While Diamond and Obie took some discovery pursuant to Bankruptcy Rule 2004 before filing the Complaint, they never had the opportunity to take discovery on the specific jurisdictional issues Petitioners raised. Nor did they have the opportunity to test Petitioners' assertion that all files were turned over. Indeed, some files were withheld on a claim of privilege and were not produced when the asserted privilege was later waived.

The Magistrate, to whom the motion was referred, recommended dismissal. APP. 36a. Apparently relying on the text of Bankruptcy Rule 7001 prior to its 1987 amendment, the Magistrate held that the Bankruptcy Rules could only be applied in Bankruptcy Court. APP. 31a. Further, the Magistrate held that, notwithstanding Petitioners' acknowledged contacts with Illinois, Diamond's and Obie's claims did not "arise from" those contacts within the meaning of the Illinois long-arm statute. APP. 32a-36a.

The District Court adopted the Magistrate's recommendation in a one-paragraph minute order. While conceding there was "superficial logic" to the proposition that the bankruptcy courts are no longer jurisdictionally distinct from the district courts, the District Court held that Diamond and Obie could utilize Bankruptcy Rule 7004(d) only in bankruptcy

court. APP. 38a. The District Court adopted without comment the Magistrate's recommendation as to the Illinois long-arm statute.

Diamond and Obie moved to reconsider, noting again that the 1987 Bankruptcy Rules amendments had made the Bankruptcy Rules expressly applicable in the district courts. The District Court denied reconsideration, this time holding that the Bankruptcy Rules are applicable only in "core proceedings" as defined in 28 U.S.C. § 157. APP. 41a.

Contrary to Petitioners' assertion (Pet. at 21) that the District Court "found that it could not assert jurisdiction over the Jaffe attorneys consistent with these due process considerations," neither the District Court nor the Magistrate made reference to any due process considerations.

The Court of Appeals reversed, holding that the adversary Bankruptcy Rules, and Rule 7004(d) in particular, by definition apply to this proceeding and that the District Court's exercise of personal jurisdiction over Petitioners would not violate the Fifth Amendment Due Process Clause. APP. 12a-20a. In so doing, the Court of Appeals rejected Petitioners' contentions that the Bankruptcy Rules apply only to proceedings "commenced" in a bankruptcy court and that they apply only to "core" proceedings. APP. 12a-16a; APP. 17a-18a.

The Court of Appeals also reversed the District Court's judgment as to the Illinois long-arm statute, finding an independent and alternative basis for personal jurisdiction under Illinois law. While the Magistrate and the District Court had held that the statute conferred jurisdiction only if specific negligent

acts were performed in Illinois, the Court of Appeals found the Magistrate's treatment "perplex[ing]." APP. 23a. Noting that Illinois courts consistently require only that the cause of action "lie in the wake of the transaction of business" in Illinois, APP. 22a, the Court of Appeals observed that Petitioners' failure to reveal their conflicts of interest and to remedy them lay "in the wake of" all their contacts with Illinois, including visits, correspondence, and telephone calls. APP. 23a.

Finally, the Court of Appeals rejected Petitioners' contention that the District Court's exercise of personal jurisdiction under the Illinois long-arm statute would violate the Due Process Clause. There was no dispute that Petitioners had intentionally provided services directly to their Illinois clients and that those services were

expressly tailored to the requirements of their Illinois clients. APP. 24a-25a. Nor had Petitioners shown that litigation in the Northern District of Illinois, the location of the clients they had represented and where they had performed acts on those clients' behalf, was excessively burdensome. APP. 26a.[6/]

After the Court of Appeals issued its opinion, Petitioners filed a petition for rehearing with suggestion for rehearing en banc. The Court of Appeals denied this petition, no judge in active service requesting a vote for rehearing. APP. 43a-44a.

[6/] Petitioners, who are based in Detroit, contended they could be sued anywhere in the state of Michigan, but that litigation in Chicago would impose an undue (and, therefore, unconstitutional) burden. However, in practical terms, travel between Detroit and Chicago is far less burdensome than travel between Detroit and, for example, Michigan's Upper Peninsula.

REASONS FOR DENYING THE PETITION

I.
THE JUDGMENT BELOW RESTS ON AN INDEPENDENT STATE-LAW GROUND IN WHICH THERE IS NO FEDERAL INTEREST.

Wholly apart from the bankruptcy issue resolved by the Court of Appeals, the decision below rests alternatively and independently on personal jurisdiction conferred by the Illinois long-arm statute. Thus, even if this Court were to conclude that the Court of Appeals wrongly decided the bankruptcy issue, the judgment could not be changed unless this Court reviewed and reversed the Court of Appeals on a question of Illinois statutory interpretation.

This Court should not grant certiorari to interpret Illinois law. Implicitly recognizing this, Petitioners attempt to recast the state-law issue as a question of standard-of-review. This

attempt mischaracterizes the Court of Appeals' holding and, even if accepted arguendo, presents only a fact-bound inquiry unsuited to review by this Court.

A. This Court Should Not Devote Its Limited Resources To Deciding A Pure Question Of State Law.

This Court "do[es] not ordinarily review the holding of a court of appeals on a matter of state law." Pierson v. Ray, 386 U.S. 547, 558 n. 12 (1967); see also Haring v. Prosise, 462 U.S. 306, 314 n. 8 (1983). There is no significant federal interest in having this Court interpret the Illinois long-arm statute. The Illinois courts are charged with principal responsibility for interpreting Illinois law. This Court's limited resources should be reserved for other purposes.

Moreover, the Illinois long-arm statute has been significantly amended

since the time this action was commenced. See Exhibit 1 hereto.[7/] It would be particularly wasteful for this Court to expend its resources on interpreting a superseded statute.

This Court routinely "accord[s] great deference to the interpretation and application of state law by the courts of appeals." Pembaur v. Cincinnati, 475 U.S. 469, 484 n. 13 (1986); see also Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530, 534 (1949). The Court of Appeals has extensive experience in interpreting the Illinois long-arm statute

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[7/] While the former statute applicable here had been interpreted by Illinois courts independently of the Due Process Clause, see, e.g., Green v. Advance Ross Electronics Corp., 86 Ill. 2d 431, 436-37, 427 N.E.2d 1203, 1206 (1981); Petty v. Cadwallader, 135 Ill. App. 3d 695, 697, 482 N.E.2d 225, 227 (4th Dist. 1985), the amended statute now permits jurisdiction on "any . . . basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." P.A. 86-840 § 1(c).

and has issued numerous opinions on the relevant issue.[8/] The Court of Appeals did not ignore the cases on which Petitioners relied but, rather, carefully considered them. APP. 23a-24a. Exercise of this Court's certiorari jurisdiction to review an issue of solely historical and parochial interest is wholly unjustified.

Finally, the law of personal jurisdiction is especially fact bound. See, e.g., Shaffer v. Heitner, 433 U.S. 186, 221 (1977) (Brennan, J., concurring in part and dissenting in part). Even if this Court were inclined to review a question of state law, review of the holding below is unlikely to generate any

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[8/] See, e.g., John Walker & Sons, Ltd. v. DeMert & Dougherty, Inc., 821 F.2d 399, 401-04 (7th Cir. 1987); Jacobs/Kahan & Co. v. Marsh, 740 F.2d 587, 589-91 (7th Cir. 1984); Deluxe Ice Cream Co. v. R.C.H. Tool Corp., 726 F.2d 1209, 1212-16 (7th Cir. 1984); In re Oil Spill by Amoco Cadiz, 699 F.2d 909, 915 (7th Cir.), cert. denied sub nom. Astilleros Espanoles, S.A. v. Standard Oil Co., 464 U.S. 864 (1983).

principles of general application even for Illinois litigants.

B. The Court Of Appeals Did Not Improperly Disturb Any Factual Findings By The District Court.

Petitioners attempt to wring a federal issue out of a state-law question by asserting that the Court of Appeals "improperly substituted its views for those of the district court." Pet. at 24. Petitioners simply ignore the actual inquiry the Court of Appeals undertook.

The Magistrate recognized that Petitioners had contacts with Illinois on Diamond's and Obie's business, including personal visits, phone calls, and letters. APP. 33a. But the Magistrate thought that these contacts "do not appear to constitute the malpractice of which plaintiffs complain." APP. 34a. Further, the Magistrate thought that the Illinois statute was not satisfied because, as he

read the Complaint, Petitioners had not committed any acts of malpractice in Illinois. APP. 35a.

Petitioners concede that the question whether there is a "nexus" between their Illinois contacts and the cause of action alleged in the Complaint "is a mixed question of law and fact subject to de novo review." Pet. at 24-25; see, e.g., Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982) (district court's findings resting on erroneous view of applicable law are subject to de novo review). Appellate courts are free to

> correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding that is predicated on a misunderstanding of the governing rule of law.

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 (1984).

Here, the Magistrate's and District Court's findings were predicated on a

misunderstanding of the governing long-arm statute. The controlling question is not what Petitioners' Illinois contacts were, but the legal significance of those contacts as measured by the statutory standard.

The Court of Appeals held that the Magistrate (and, by adoption, the District Court) applied an overly rigid interpretation of the Illinois statute. While the Magistrate apparently thought that the cause of action must arise from business actually transacted in Illinois, the Court of Appeals held that "Illinois's long-arm statute '"requires only that the cause of action lie in the wake of the transaction of business [in Illinois]."'" APP. 22a.

Applying this standard, the Court of Appeals found that Petitioners' Illinois contacts easily satisfied the Illinois statute. The essence of Diamond's and

Obie's Complaint was Petitioners' failure to disclose material conflicts and their failure to withdraw as counsel. Petitioners "had an obligation to disclose their conflict of interest when they transacted business or gave legal advice to Diamond and Obie in Illinois." APP. 23a. The Magistrate's "perplex[ing]" treatment of the Complaint simply ignored the cause of action Diamond and Obie alleged. Id.

The Court of Appeals was not bound by either the Magistrate's interpretation of the Illinois long-arm statute or his interpretation of the Complaint.[9/] Neither of these is a factual

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[9/] Contrary to Petitioners' assertion (Pet. at 25-26), the Court of Appeals did not ignore facts and "recit[e] the mere allegations of the complaint." The Complaint's allegations determine the cause of action that must arise from the jurisdictional contacts. The Court of Appeals focused on the Complaint because the Magistrate failed to do so in his treatment of Diamond's and Obie's claims.

determination. The Court of Appeals properly reviewed these matters de novo and applied the undisputed facts.

The record in this action does not present the standard-of-review issue Petitioners wish to assert. Petitioners agree that the Court of Appeals was entitled to undertake de novo review of the intertwined questions of law and fact that determine personal jurisdiction. That is exactly what the Court of Appeals did.

C. Petitioners Present No Colorable Due Process Claim.

Making a brief stab at a constitutional argument, Petitioners assert that their Due Process Clause rights were violated because they had no "fair warning" that their representation of Diamond and Obie might subject them to personal jurisdiction in Illinois. Pet. at 27. This argument has no chance of

success. It runs counter to this Court's well-established due-process jurisprudence, and it presents no novel or important issues warranting a reassessment of this Court's prior decisions.

Petitioners assert that they could, over a five-year period: (1) knowingly represent an Illinois client; (2) knowingly represent a client that made mortgages solely on Illinois real estate and sold investments solely to Illinois investors; (3) knowingly tailor their work product to the Illinois client's Illinois needs; and (4) knowingly transmit their work product to the client in Illinois through letters, phone calls, and personal visits - yet still have no "fair warning" that the client might sue them for malpractice in Illinois. Petitioners' contention is self-refuting, as the Court of Appeals correctly held.

This is not a case like World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), in which the stream of commerce eventually and unforeseeably carried the defendant's product to a far-off state. 444 U.S. at 295-97. Here, the sale of services was directly to Illinois. As this Court observed in World-Wide Volkswagen:

> Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its product into the stream of commerce with the expectation that it will be purchased by consumers in the forum State.

444 U.S. at 297-98 (emphasis added).

Here, Petitioners had more the an

expectation that their "product" - legal services - would be purchased by consumers in Illinois. That was a certainty, since the sale was direct to Diamond and Obie. And, like a car that lacks a critical part, Petitioners' product was defective: it lacked loyalty.

Petitioners not only dealt directly with Diamond and Obie in Illinois, they tailored their product to their Illinois clients' specific needs. While merely placing a product in the stream of commerce does not suffice to connect the producer with a particular forum state, "designing the product for the market in the forum State" adds the necessary connection. Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 112 (1987); Mason v. F. LLI Luigi and Franco Dal Maschio Fu G.B. s.n.c, 832 F.2d 383, 386 (7th Cir. 1987); Amoco Cadiz, 699 F.2d at 916 (same). Petitioners had to know that,

if the product was defective, they were likely to be sued in Illinois.

Personal jurisdiction does not depend on technicalities. So long as a defendant has "purposefully directed" its acts toward residents of the forum state, the defendant need never have been physically present in the forum state to be subject to jurisdiction there. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). The Due Process Clause does not require a "mechanical" tally of visits, letters, or phone calls. Burger King, 471 U.S. at 478.

Petitioners' physical contacts with Diamond and Obie in Illinois are substantial. But even if they were not, this Court's decisions demonstrate that Petitioners' longstanding attorney-client relationship with Diamond and Obie makes the exercise of personal jurisdiction in Illinois both foreseeable and just. This

case supplies neither novel facts nor special considerations of justice that would warrant review.

II.
THE COURT OF APPEALS' DECISION OF THE BANKRUPTCY RULES ISSUE WAS FULLY CONSIDERED AND PRESENTS NO SPECIAL REASONS JUSTIFYING REVIEW.

Though they hyperbolically state that "[i]t is difficult to imagine a more important conflict than the question of personal jurisdiction presented by this case," Pet. at 5, Petitioners point to no conflict with any decision of this Court or of any court of appeals.

Further, Petitioners themselves cite a dozen district court and bankruptcy court decisions fully consistent with the decision below. Pet. at 9 n. 9; id. at 16 n. 14; id. at 17 n. 15. Ignoring the obvious conclusion that the lower courts are consistently getting the issue right,

Petitioners attempt to spin gold from straw by asserting that the "havoc" of these allegedly incorrect decisions "is approaching epidemic proportions." Id. at 16.

Petitioners' approach to certiorari turns this Court's rules on their head. Supreme Court Rule 10.1(a) provides that the hallmarks of a decision meriting review are conflict with a decision of this Court or the decision of another court of appeals, or an extensive departure from the accepted and usual course of judicial proceedings. To the contrary, Petitioners assert that unanimity of lower-court opinion demonstrates "widespread confusion," Pet. at 5, and requires this Court's action.

Rather than stem the tide of correct decisions below, this Court should reserve its certiorari jurisdiction for issues that present important conflicts. As the

following sections show, Petitioners' construction of the Bankruptcy Rules and their enabling statutes is grounded on a misreading of the Rules' language and sows confusion where none exists.

A. The Bankruptcy Rules Apply In "Related To" Proceedings.

Pursuant to authority granted by Congress, 28 U.S.C. § 2075, this Court has promulgated rules of procedure for bankruptcy cases and proceedings (the "Bankruptcy Rules"). Among these is Bankruptcy Rule 7004(d), which provides for nationwide service of process. Petitioners assert that, although the District Court properly had subject-matter jurisdiction under the "related to" prong of the bankruptcy jurisdictional statute, 28 U.S.C. § 1334(b), the Bankruptcy Rules do not apply to any "related to" proceedings, whether they are before a district judge or a bankruptcy judge.

This sweeping nullification of the Bankruptcy Rules finds no support from any court and is dead wrong.

In Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), this Court invalidated the portion of the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, that granted to Article I bankruptcy judges the power to decide state-law disputes subject only to appellate review. 458 U.S. at 87 and n. 40. In the wake of Northern Pipeline, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), Pub. L. No. 98-353, 98 Stat. 333, which created the following jurisdictional scheme:

(1) district courts have "original and exclusive jurisdiction of all cases under title 11 [of the United States Code]." 28 U.S.C. § 1334(a);

(2) district courts have "original but not exclusive jurisdiction of all civil proceedings arising

under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b);

(3) district courts may refer "all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11" to bankruptcy judges. 28 U.S.C. § 157(a);

(4) bankruptcy judges may enter final orders, subject only to appellate review, in "core" proceedings. 28 U.S.C. § 157(b)(1); and

(5) bankruptcy judges may "hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11" but may make only recommended findings and conclusions to the district court, subject to de novo review. 28 U.S.C. § 157(c)(1).

Unlike the independent bankruptcy courts created by the 1978 Bankruptcy Code, the bankruptcy judges under BAFJA are "a unit of the district court." 28 U.S.C. § 151. Their jurisdiction is solely derivative of the district courts' jurisdiction. Wasserman v. Immormino (In re Granger Garage, Inc.), No. 89-4022 (6th Cir. Nov.

30, 1990), 1990 U.S. App. LEXIS 20847 at *6-*7.

The 1978 Bankruptcy Code and BAFJA created several significant jurisdictional terms of art. The bankruptcy "case," over which the district courts have exclusive jurisdiction (subject to referral to a bankruptcy judge) includes the whole collection of "proceedings," each one of which in form may resemble a separate lawsuit, that must be adjudicated after a bankruptcy petition is filed. S. Rep. No. 989, 95th Cong., 2d Sess. 153-54, reprinted in 1978 U.S. Code Cong & Admin. News 5787, 5939-40 ("As used in this section, everything that occurs in a bankruptcy case is a proceeding."); 1 Collier on Bankruptcy, ¶ 3.01 at 3-20-21 (15th ed. 1990).

"Proceedings" are of three types: (1) those "arising under title 11," (2) those "arising in . . . a case under title

11," and (3) those "related to a case under title 11." 28 U.S.C. § 1334(b). A proceeding is "related to" a case under title 11 if its outcome "affects the amount of property available for distribution or the allocation of property among creditors." Elscint, Inc. v. First Wisconsin Financial Corp. (In re Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987); accord, Kelly v. Nodine (In re Salem Mortgage Co.), 783 F.2d 626, 634 (6th Cir. 1986); Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984). The District Court had subject-matter jurisdiction under the "related to" prong of 28 U.S.C. § 1334(b) because, although the substantive law governing Diamond's and Obie's cause of action is not supplied by title 11, its outcome will have a significant impact on the distribution to creditors. Petitioners do not contest this. Pet. at 3.

Petitioners argue that none of the Bankruptcy Rules is applicable in proceedings under the "related to" jurisdictional prong of 28 U.S.C. § 1334(b), regardless of whether the proceeding is pending before a district judge or a bankruptcy judge. This represents a change of position. Petitioners argued below that, as the District Court held (APP. 38a), Rule 7004(d) would have applied had this lawsuit been filed with the bankruptcy clerk's office. Nevertheless, Petitioners' new assertion is as incorrect as their old one.

Petitioners' whole argument is based on a misreading of Bankruptcy Rule 1001, which provides:

> The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code.

Petitioners incorrectly equate the phrase "cases under title 11" with the first

prong of 28 U.S.C. § 1334(b), which grants the district courts original but not exclusive jurisdiction over "all civil proceedings arising under title 11." Thus, Petitioners argue, proceedings deriving jurisdiction from § 1334(b)'s third ("related to") prong are excluded from the Bankruptcy Rules' scope.

A "case under title 11" is not the same thing as a "proceeding arising under title 11." As shown above, a "case under title 11" is the umbrella under which all disputes connected with the bankruptcy estate are collected. See 28 U.S.C. § 1334(a) (granting district courts exclusive jurisdiction of "all cases under title 11"). By contrast, a "proceeding arising under title 11" is a proceeding that asserts a cause of action based on some title 11 provision. H.R. Rep. No. 595, 95th Cong., 2d Sess. 445-46, reprinted in 1978 U.S. Code Cong. & Admin.

News 5787, 6401; Carlton v. BAWW, Inc., 751 F.2d 781, 787 (5th Cir. 1985); 1 Collier on Bankruptcy ¶ 3.01 at 3-23-26.

Petitioners' argument founders on their assumption that the phrase "cases under title 11" as used in Bankruptcy Rule 1001 means the same thing as "proceedings arising under title 11" as used in 28 U.S.C. § 1334(b). It doesn't.[10/]

Indeed, if Petitioners' argument were correct, this Court, in promulgating the Bankruptcy Rules, and Congress, in sanctioning them, would have left a huge gap in bankruptcy procedure, because, under Petitioners' argument, even bankruptcy courts cannot apply the

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[10/] By the same token, Petitioners' argument that 28 U.S.C. § 2075 does not authorize rulemaking for "related to" proceedings (Pet. at 9-10) must fail. Section 2075 gives this Court authority to prescribe rules of practice and procedure "in cases under title 11." Again, this does not mean "in proceedings arising under title 11."

Bankruptcy Rules in "related to" proceedings. But the Bankruptcy Courts cannot apply the Federal Rules of Civil Procedure either. See Fed. R. Civ. P. 81(a)(1) ("These rules do not apply to proceedings in bankruptcy"). Thus, according to Petitioners, this Court and Congress have left bankruptcy courts with no rules to govern procedure in the numerous "related to" proceedings that they adjudicate every day.[11/] Petitioners' argument is not only erroneous, it produces an impossible result.

[11/] Petitioners recognize this problem and suggest that the Advisory Committee on Civil Rules needs to make some changes. Pet. at 8 n. 8. But they are apparently the first and only ones to see the need for a change. Only on Petitioners' garbled reading of the statute and the Rule is a change necessary.

B. This Is An "Adversary Proceeding," To Which The Bankruptcy Adversary Rules Apply.

Petitioners' second textual argument is that, even if the Bankruptcy Rules apply to "related to" proceedings, the 7000-series rules apply only to "adversary proceedings," and this is not one. This argument fails because, as the Court of Appeals correctly found, this is an adversary proceeding as defined in the Bankruptcy Rules.

"Adversary proceeding" is another bankruptcy term of art. It is defined as, among other things, a proceeding "to recover money or property . . . ." Bankruptcy Rule 7001(1). This suit is one "to recover money." Petitioners argue (Pet. at 12-13) that this phrase applies only to proceedings to "recover" money that was once part of the estate. This contention has no legal support and is

contrary to common sense. Money is fungible. Only if a suit sought the return of specific coins or dollar bills - which would be of interest only to a numismatist - would the suit be one to "recover money" in the sense Petitioners advance. Yet lawyers and courts, including this Court, regularly speak of "recovering" money damages. See, e.g., Miles v. Apex Marine Corp., 111 S. Ct. 317, 320 (1990) ("recover damages for loss of society"); Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2704 (1990) ("recovery of presumed or punitive damages"); Texaco, Inc. v. Hasbrouck, 110 S. Ct. 2535, 2538 (1990) ("respondents recovered treble damages").[12/]

[12/] It is also obviously nonsense to speak of "recovering" punitive or treble damages in Petitioners' parlance, because the money paid by the defendant was never even notionally the prior property of the plaintiff.

Petitioners frequently assert that this suit is not an adversary proceeding because it is essentially a state-court action that, solely by virtue of Diamond's and Obie's bankruptcy, is proceeding in a federal court. However, Bankruptcy Rule 7001(10) expressly provides that any state-court suit removed to federal court pursuant to 28 U.S.C. § 1452 is an adversary proceeding.[13/] Thus, had this suit originally been commenced in state court, upon its removal to federal court it would by definition be an adversary proceeding. The fact that this suit was commenced in federal court rather than

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13/ Though in non-bankruptcy litigation only a defendant may remove to federal court, 28 U.S.C. § 1441(a), Section 1452 provides that a "party" may remove claims related to bankruptcy cases. Thus, had Diamond and Obie commenced this suit in state court and then filed their bankruptcy petitions, they would have been entitled to remove.

state court does not make it any less an adversary proceeding.

Finally, the Advisory Committee notes to Rule 7001 negate Petitioners' contention. The notes state:

> Proceedings to which the rules in Part VII apply directly include those brought to avoid transfers by the debtor under §§ 544, 545, 547, 548 and 549 of the Code; subject to important exceptions, proceedings to recover money or property . . . .

Sections 544, 545, 547, 548, and 549 of the Bankruptcy Code in a sense apply to the "recovery" of property transferred away by the debtor. But "proceedings to recover money or property" is an independent prong following the semicolon. It does not modify the avoidance of transfers; it adds another category. If Petitioners' interpretation were correct, this separate category would not exist.

Much of Petitioners' argument is devoted to a discussion of "plenary" and "summary" proceedings under the now-

repealed Bankruptcy Act of 1898. But the 1978 Bankruptcy Code eliminated these categories and changed the structure of bankruptcy courts and their jurisdiction. Northern Pipeline, 458 U.S. at 54; see also S. Rep. No. 989, 95th Cong., 2d Sess. 153, reprinted in 1978 U.S. Code Cong. & Admin. News, 5787, 5939 ("[P]roceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under current bankruptcy law."). Petitioners thus argue from principles and definitions that no longer exist.

C. Applying Nationwide Service Of Process Does Not Offend The Due Process Clause In This Case.

Petitioners' final argument is that the Due Process Clause prohibits assertion of nationwide personal jurisdiction in a "related to" proceeding under 28 U.S.C.

§ 1334(b). Even if there were merit in Petitioners' argument, this case is not a proper test. As noted above (see section I(C)), Petitioners' contacts with the state of Illinois are quite substantial enough to satisfy any reading of the Due Process Clause. Thus, even assuming arguendo that 28 U.S.C. § 1334(b) requires minimum contacts with the forum state, Petitioners have such contacts. This case therefore does not present the question whether a defendant's contacts with the United States alone, as opposed to the forum state, satisfy the Due Process Clause. This Court should not grant certiorari to decide an abstract question where it is inevitable that the Court of Appeals was correct as to the result.

In any event, the Court of Appeals' decision was correct. Relying on an unbroken line of decisions, the Court of Appeals properly held that Congress may

constitutionally provide for nationwide service of process and that it has done so here. APP. 19a-20a; see also United States v. Union Pacific Railroad Co., 98 U.S. 569, 604 (1879) (the Constitution does not prohibit Congress from providing that suits of a special character may be brought in any federal circuit court).

Petitioners argue that their state-created rights should not be altered by the happenstance that their clients have filed bankruptcy petitions. But it is commonplace that state-created rights change in bankruptcy. Secure property rights may be avoided as preferences or fraudulent conveyances. 11 U.S.C. §§ 547, 548(a). Indisputable rights to foreclose or pursue actions against a debtor are stayed. 11 U.S.C. § 362. Perfected security interests in fruits of collateral may be negated. 11 U.S.C. § 552(a).

Nothing in the decision below changes Petitioners' fundamental substantive rights. Whether they are liable for malpractice has not been affected by the "happenstance" of bankruptcy. The only difference potentially created by bankruptcy is the physical location of the trial. This is a much lesser change than the substantive changes wrought by 11 U.S.C. §§ 362, 547, 548(a), and 552 and does not rise to constitutional dimension.

CONCLUSION

For all of the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Ronald R. Peterson
Russ M. Strobel
Counsel of Record
C. Steven Tomashefsky
Daniel S. Goldman
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Counsel for Respondents

EXHIBIT

Illinois Public Act 86-840,
Amending Ill. Rev. Stat. ch. 110, ¶ 2-209

LAWS

OF THE

STATE OF ILLINOIS

EIGHTY-SIXTH GENERAL ASSEMBLY

1989

PUBLIC ACT 86-1
THRU
PUBLIC ACT 86-1027

health centers.

Passed in the General Assembly June 14, 1989.
Approved September 7, 1989.
Effective January 1, 1990.

PUBLIC ACT 86-840
(Senate Bill No. 772)

AN ACT to amend the Code of Civil Procedure, approved August 19, 1981, as amended, by changing Section 2-209.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. The Code of Civil Procedure, approved August 19, 1981, as amended, is amended by changing Section 2-209 as follows:

(Ch. 110, par. 2-209)

Sec. 2-209. Act submitting to jurisdiction - Process.

(a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any of such acts:

(1) The transaction of any business within this State;

(2) The commission of a tortious act within this State;

(3) The ownership, use, or possession of any real estate situated in this State;

(4) Contracting to insure any person, property or risk located within this State at the time of contracting;

(5) With respect to actions of dissolution of marriage, *declaration of invalidity of marriage* and legal separation, the maintenance in this State of a matrimonial domicile at the time this cause of action arose or the commission in this State of any act giving rise to the cause of action;

(6) With respect to actions brought under the Illinois Parentage Act of 1984, as now or hereafter amended, the performance of an act of sexual intercourse within this State during the possible period of conception;~~,~~

(7) The making or performance of any contract or promise substantially connected with this State;

(8) The performance of sexual intercourse within this State which is claimed to have resulted in the conception of a child who resides in this State;

(9) The failure to support a child, spouse or former spouse who has continued to reside in this State since the person either formerly resided with them in this State or directed them to reside in this State;

(10) The acquisition of ownership, possession or control of any asset or thing of value present within this State when ownership, possession or control was acquired;

(11) The breach of any fiduciary duty within this State;

(12) The performance of duties as a director or

officer of a corporation organized under the laws of this State or having its principal place of business within this State;

(13) The ownership of an interest in any trust administered within this State; or

(14) The exercise of powers granted under the authority of this State as a fiduciary.

(b) A court may exercise jurisdiction in any action arising within or without this State against any person who:

(1) Is a natural person present within this State when served;

(2) Is a natural person domiciled or resident within this State when the cause of action arose, the action was commenced, or process was served;

(3) Is a corporation organized under the laws of this State; or

(4) Is a natural person or corporation doing business within this State.

(c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

(d) ~~(b)~~ Service of process upon any person who is subject to the jurisdiction of the courts of this State, as provided in this Section, may be made by personally serving the summons upon the defendant outside this State, as provided in this Act, with the same force and effect as though summons had been personally served within this State.

(e) ~~(c)~~ Service of process upon any person who resides or whose business address is outside the United States and who is subject to the jurisdiction of the courts of this State, as provided in this Section, in any action based upon product liability may be made by serving a copy of the summons with a copy of the complaint attached upon the Secretary of State. The summons shall be accompanied by a $5 fee payable to the Secretary of State. The plaintiff shall forthwith mail a copy of the summons, upon which the date of service upon the Secretary is clearly shown, together with a copy of the complaint to the defendant at his or her last known place of residence or business address. Plaintiff shall file with the circuit clerk an affidavit of the plaintiff or his or her attorney stating the last known place of residence or the last known business address of the defendant and a certificate of mailing a copy of the summons and complaint to the defendant at such address as required by this subsection *(e)* ~~(c)~~. The certificate of mailing shall be prima facie evidence that the plaintiff or his or her attorney mailed a copy of the summons and complaint to the defendant as required. Service of the summons shall be deemed to have been made upon the defendant on the date it is served upon the Secretary and shall have the same force and effect as though summons had been personally served upon the defendant within this State.

(f) ~~(d)~~ Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him or her is based upon *subsection (a)* ~~this Section~~.

(g) ~~(e)~~ Nothing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law.

Section 2. This Act takes effect upon becoming law.

New matter indicated by italics - deletions by strikeout.

Passed in the General Assembly June 28, 1989.
Approved September 7, 1989.
Effective September 7, 1989.